ECM COACHBUILDERS SDN BHD

v.

INTRABUANA TOUR & TRAVEL SDN BHD & ORS

HIGH COURT SABAH & SARAWAK, KOTA KINABALU
LEE HENG CHEONG JC
[SUIT NO: KK22-89-2010]
6 SEPTEMBER 2012

CONTRACT: *Agreement - Loan - Loan to finance purchase of 40 seater Coach - Failure to disburse loan - Whether second defendant's refusal to disburse loan to plaintiff due solely to first defendant's failure to comply with pre-disbursement conditions - Whether second defendant's responsibility to pay balance claimed by plaintiff*

CONTRACT: *Breach - Allegation of - Damages - Counterclaim for - Agreement to build 40 seater Coach between first defendant and plaintiff - Delivery of Coach to first defendant - Coach burnt down whilst in first defendant's possession, control and care - Whether ownership and risk of Coach transferred to first defendant - Whether first defendant wholly responsible for loss of Coach - Whether first defendant failed to adduce credible evidence to prove counterclaim*

CONTRACT: *Building contract - Claim for moneys owing - Agreement to build 40 seater Coach - Failure to pay balance of purchase price - Responsibility to pay balance claimed - Letter of offer showed first defendant buyer of Coach - Whether second defendant's refusal to disburse loan to plaintiff due solely to first defendant's failure to comply with pre-disbursement conditions - Whether plaintiff proved case on balance of probability*

The first defendant had instructed the plaintiff, a Coach builder, to build a 40 seater Coach ('the said Coach'). The second defendant, a financial institution, by a letter of offer ('the letter of offer') approved the first defendant's request for loan to finance the purchase of the said Coach in the sum of RM380,511.20 ('the said loan") from the plaintiff. The first defendant paid a deposit of RM20,000 to the plaintiff as initial payment or deposit for the purchase of the said Coach and the said Coach was delivered to the first defendant on 1 June 2007. The said coach, however, was completely burnt down on 3 June 2007 and was beyond repair. The balance of the purchase price of the said Coach remained unpaid. Thus, the plaintiff claimed against the first and second defendants for the said balance purchase price of the said Coach,

A amounting to RM360,511.20. It was the first defendant's contention, *inter alia*, that it was the second defendant that had agreed to grant the first defendant a lease facility to finance the purchase of the said Coach and that it was the second defendant's responsibility to pay the balance claimed by the B plaintiff. The first defendant also contended that the plaintiff had entered into an agreement with the second defendant without the consent and knowledge of the first defendant. The first defendant also filed a counterclaim against the plaintiff for damages for breach of contract. The second defendant contended, *inter alia*, that the C disbursement of the said loan was subject to the pre-disbursement conditions as stated in the letter of offer and that the first defendant had failed to fulfil the pre-disbursement conditions which resulted in the said letter of offer being repudiated.

D **Held (entering judgment against first defendant; dismissing first defendant's counterclaim; dismissing plaintiff's case against second defendant):**

(1) Notwithstanding the approval of the said loan by the second defendant, the first defendant was the buyer of the said E Coach, which was evidenced by the letter of offer from the second defendant to the first defendant wherein the second defendant indicated its intention to hire the said Coach from the first defendant. The plaintiff pursuant to the agreement with the first defendant, had built the said Coach according F to the agreed specifications, delivered the same to the first defendant and registered the ownership of the said Coach in the name of the first defendant and thus had fully performed the said agreement. (paras 10 & 12)

G **(2)** The first defendant's contention that the plaintiff had entered into an agreement with the second defendant, without the consent and knowledge of the first defendant, to release the Coach to the first defendant prior to the disbursement of the said loan, was without basis and merits. In fact, the delivery H of the said Coach to the first defendant was to enable and facilitate the disbursement of the said loan by the second defendant. (para 13)

(3) The second defendant's refusal to disburse the said loan to I the plaintiff was due solely to the first defendant's failure to comply with the pre-disbursement conditions of the second defendant. Since the said Coach was delivered and ownership of the same was transferred to the first defendant, the risk of

the said Coach had passed to the first defendant. Since the said Coach was burnt after the ownership and risk of the same was transferred to the first defendant, and whilst in the first defendant's possession, control and care, the first defendant was wholly responsible for the loss of the said Coach. Thus, the first defendant had failed to adduce any credible evidence to prove its counterclaim. (paras 15, 19 & 24)

(4) The second defendant was not liable to pay out the said loan to the plaintiff. The second defendant's letter of offer and subsequent supplementary letters of offer contained the pre-disbursement conditions that must be fulfilled by the first defendant before payment could be released by the second defendant to the plaintiff. Since the first defendant failed to fulfil the requirement when it failed to pay the initial payment of RM45,166.02 to the second defendant, *ie*, the advance rental payment of RM37,638.35 and the first month rental payment of RM7,527.67, the second defendant had no contractual obligation to release the payment to the plaintiff. Further, the second defendant was not privy to the agreement entered between the plaintiff and the first defendant for the purchase of the said Coach and the plaintiff was not privy to the letter of offer and the lease agreement entered into between the first defendant and the second defendant. (para 28)

(5) The plaintiff knew at all material times that the pre-disbursement conditions had not yet been fulfilled by the first defendant and the plaintiff knew that the second defendant had no contractual obligation to release the payment for the said Coach to the plaintiff. Further, the delivery of the said Coach was made by the plaintiff to the first defendant without the instruction, knowledge and consent of the second defendant as contended by the plaintiff. (para 31)

(6) In the premises, the plaintiff had proved its case on a balance of probability against first defendant and therefore, judgment was ordered to be entered against the first defendant. The first defendant's counterclaim was also dismissed. As regards the second defendant, the plaintiff had failed to prove its case against the second defendant. (paras 33 & 34)

Case(s) referred to:
Arab-Malaysian Credit Bhd v. Saujana Kinabalu Sdn Bhd & Ors and Another Case [2011] 10 CLJ 10 HC ***(refd)***
Ling Chick Ngai v. Scott & English (M) Sdn Bhd [2006] 7 CLJ 602 HC ***(refd)***
Low Hock Jee v. Mayban Finance Berhad [1996] 2 CLJ 479 HC ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 5

Sale of Goods Act 1979 [UK], s. 20

For the plaintiff - Chin Tek Min; M/s Chin Jingulam & Assocs
For the 1st defendant - Siti Azizah M Yusop; M/s Azizah & Co
For the 2nd defendant - Faizal Sarbi; M/s Cheu Adnan & Razi

Reported by Suhainah Wahiduddin

JUDGMENT

Lee Heng Cheong JC:

Introduction

[1] The plaintiff is a coach builder and it is not disputed that:

(a) The 1st defendant instructed the plaintiff to build the 40-seater Coach, with Nissan Engine JP251S, Registration No. SAA4152P ("the said Coach");

(b) The 2nd defendant, a financial institution, by a letter of offer dated 5 October 2006 ("the letter of offer"), approved the 1st defendant's request for loan to finance the purchase of the said Coach in the sum of RM380,511.20 ("the said loan") from the plaintiff;

(c) The 1st defendant paid a deposit of the sum of RM20,000 to the plaintiff as initial payment or deposit for the purchase of the said Coach and the said Coach was delivered to the 1st defendant on 1 June 2007 at 7.20pm;

(d) The said Coach was completely burnt down on 3 June 2007 at around 8.15pm while travelling from Tambunan to Kota Kinabalu, towards Gunung Emas and was beyond repair; and

(e) The balance of the purchase price of the said Coach in the sum of RM360,511.20 remains unpaid as at the date of trial.

The Plaintiff's Claim

[2] The plaintiff now claims against the 1st and 2nd defendant for the said balance purchase price of the said Coach, amounting to RM360,511.20 together with interest as pleaded in the statement of claim dated 14 May 2010.

The 1st Defendant's Defence And Counterclaim

[3] The 1st defendant contended that there is no agreement between the plaintiff and the 1st defendant for the building of the said Coach, that the 2nd defendant agreed to grant the 1st defendant, a lease facility to finance the purchase of the said Coach, that the said Coach was delivered with defects and which defects were detected when it was burnt down, that it was the 2nd defendant's responsibility to pay the balance claimed by the plaintiff, that the 2nd defendant inspected the said Coach and advised the plaintiff to release the said Coach to the 1st defendant.

[4] The 1st defendant also contended that the plaintiff has entered into an agreement with the 2nd defendant without the consent and knowledge of the 1st defendant, to release the Coach to the 1st defendant prior to the disbursement of the said loan, that the plaintiff admitted that it was the plaintiff's fault after the fire and pleaded with the 1st defendant, not to make a big issue and arranged to remove the said Coach from the accident scene at the plaintiff's cost.

[5] The 1st defendant also filed a counterclaim against the plaintiff for damages for breach of contract in the sum of RM380,511.20 and other losses.

The 2nd Defendant's Defence

[6] The 2nd defendant contended *inter alia* that the disbursement of the said loan was subject to the pre-disbursement conditions as stated in the letter of offer dated 5 October 2006 ("letter of offer") and that the 1st defendant failed to fulfil the pre-disbursement conditions which resulted in the said letter of offer, being repudiated.

A **Consideration Of The Plaintiff's Case Against The 1st Defendant**

[7] I find that there is at all material time a valid and subsisting agreement for the design and building of the said Coach between
B the plaintiff and the 1st defendant, for a consideration sum of RM380,511.20. Further I noted that the 1st defendant did not dispute that the said Coach was ordered by the 1st defendant and that the 1st defendant had paid the deposit of RM20,000 to the plaintiff, towards the performance of the agreement. Further,
C PW1 also testified that the said Coach was built according to the specifications as set out in the quotation of the plaintiff given to the 1st defendant dated 19 January 2007, as seen in pp. 44 to 46 of the 2nd defendant's bundle of documents (exh. P1(a), (b) and (c)) and this was challenged by the 1st defendant.

D **[8]** Further the plaintiff issued an invoice dated 1 June 2007 to the 1st defendant for the building of the said Coach (refer to p. 7 of PAANCBD (exh. P4)). In addition to the completion of building of the said Coach and pursuant to the agreement
E between the plaintiff and the 1st defendant, the ownership of the completed Coach was also transferred to the 1st defendant which is evidenced in the confirmation of purchase of insurance slip, wherein the 1st defendant is named as the insured (p. 78 f DBD2 (exh. D4)). In the vehicle registration card of the said Coach, the
F 1st defendant was named as the registered owner of the said Coach (refer to p. 23 PAABD (exh. P2(i)).

[9] Notwithstanding that the said loan has been approved by the 2nd defendant to finance the purchase of the said Coach by the 1st defendant, I find that the approval of the said loan by the
G 2nd defendant does not relieve the 1st defendant of paying the balance of the purchase price for the said Coach to the plaintiff in the event that the 2nd defendant did not release the said loan to the plaintiff, for valid reasons.

H **[10]** I agree with the contention of the plaintiff that notwithstanding the approval of the said loan by the 2nd defendant, the 1st defendant was the buyer of the said Coach. This is evidenced in the letter of offer from the 2nd defendant to the 1st defendant dated 5 October 2006 (refer to p. 1 to 18 of
I DBD2 (exh. D3(a) to (r)) wherein the 2nd defendant indicated its intention to "hire" the said Coach from the 1st defendant as well as the letter from the 2nd defendant to the 1st defendant dated

14 June 2007 (pp. 4 to 7 of PAABD (exh. P5(e) to P5(h)), wherein the 2nd defendant indicated that the 1st defendant is the buyer or owner of the said Coach and set out briefly the terms of the lease of the said Coach between the 1st and 2nd defendant.

[11] I am guided by the judgment of Datuk Abdul Rahman Sebli, JC (as he then was), in the case of *Arab-Malaysian Credit Bhd v. Saujana Kinabalu Sdn Bhd & Ors and Another Case* [2011] 10 CLJ 10 which dealt with, *inter alia*, whether ownership of the buses pass to the financier, arising from the execution of the lease agreement. His Lordship observed that:

> In the lease agreements, as was the case in *AmFinance Bhd*, the plaintiffs represented as follows:
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> Whereas at the request of the Lessee the Lessor has agreed to purchase/has purchased the Equipment described in the Schedule hereto for the purpose of leasing the same to the Lessee ...
>
> If these words were to be taken at their face value, the plaintiffs (financier) were of course the owners of the buses. But do they represent the actual truth? Having regard to the evidence, this is farthest from the truth. *In the first place there is absolutely no evidence that the plaintiffs (financier) had at the request of the 1st and 2nd defendants agreed to purchase the buses for the purpose of leasing them to the 1st defendant. The evidence in fact points to the opposite direction.* The testimonies of Ng Tia Ching (PW1) the Marketing and Credit Officer of the plaintiffs' Kuala Lumpur branch at the material time and Chey Wai Ling (PW4) the Senior Manager of the plaintiffs' Kuala Lumpur branch (now Senior Manager of AmBank (M) Bhd) unmistakeably show that *it was the 2nd defendant who intended to purchase the buses from Hup Lee and not the plaintiffs (financier). The evidence further shows that it was the 1st defendant who had a contract with Hup Lee for the fabrication of the buses and not the plaintiffs (financier). There is no evidence that the construction of the buses was at the instance of the plaintiffs (financier) so that the plaintiffs (financier) could lease them to the 1st defendant.* In cross-examination PW1 was asked to confirm if the plaintiffs (financier) did not purchase the buses from the 1st defendant and his answer was an unequivocal "yes".
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> Now, if a loan was applied for, then in all probability it was a loan that the plaintiffs (financier) granted to the 1st defendant and not any other facility. Given the total lack of evidence that the buses had been purchased by the plaintiffs (financier), there is no basis for this court to arrive at the conclusion that the plaintiffs were the owner of the buses.

> If indeed the plaintiffs (financier) had intended to purchase the buses the fabrications would have been done at their instance. *To my mind this is not a case where the plaintiffs bought the buses by paying Hup Lee the purchase price in full and then let them on hire to the plaintiffs but rather a case where the 1st defendant, having paid the deposits, was unable to settle the balance on its own and had to seek a loan from the plaintiffs. It was a credit sale of the buses to the 1st defendant on the undertaking that the plaintiffs would pay the balance of the purchase price.* The facts are not dissimilar to the facts in *Major Kassim Shariff v. Kwong Yik Finance Bhd* [2001] 6 CLJ 397. (emphasis added)

[12] I find that the plaintiff, pursuant to the agreement with the 1st defendant, had built the said Coach according to the agreed specifications, delivered the same to the 1st defendant and registered the ownership of the said Coach in the name of the 1st defendant and thus had fully performed the said agreement.

[13] I find that the 1st defendant's contention that the plaintiff had entered into an agreement with the 2nd defendant, without the consent and knowledge of the 1st defendant, to release the Coach to the 1st defendant prior to the disbursement of the said loan, to be without basis and merits. In fact, the delivery of the said Coach to the 1st defendant was to enable and facilitate the disbursement of the said loan by the 2nd defendant. DW1 agreed that the 1st defendant has to take delivery of the said Coach prior to the disbursement of the said loan. At p. 4 of DBD2 (exh. D3(d), which is the letter of offer from the 2nd defendant to the 1st defendant dated 5 October 2006, in particular, para. 16(i) of the said letter of offer, which stated that one of the pre-disbursement conditions read as follows;

> syarikat/firma mestilah mengesahkan secara bertulis bahawa mesin/peralatan/kenderaan yang diterima adalah memuaskan sebelum pembayaran dapat dibiayai.

This showed that both the 1st defendant knew that the said Coach has to be delivered to the 1st defendant prior to the said loan being disbursed.

[14] I agree with the plaintiff's contention that the 2nd defendant's refusal to disburse the said loan to the plaintiff was due solely to the 1st defendant's failure to comply with the pre-disbursement conditions of the 2nd defendant.

[15] Since the said Coach was delivered and ownership of the same, was transferred to the 1st defendant, the risk of the said Coach had passed to the 1st defendant. A

[16] The Malaysian Sale of Goods Act 1957 is not applicable to the states of Sabah and Sarawak. By virtue of s. 5 of the Malaysian Civil Law Act 1956, the applicable law is the United Kingdom Sale of Goods Act 1979, as decided in *Low Hock Jee v. Mayban Finance Berhad* [1996] 2 CLJ 479. B

[17] Section 20 of the United Kingdom Sale of Goods Act 1979 reads: C

> Unless otherwise agreed, the goods remain at the seller's risk until the property in them is transferred to the buyer, but when the property in them is transferred to the buyer the goods are at the buyer's risk whether delivery has been made or not. D

[18] From the evidence, I find that the 1st defendant did not dispute that it has inspected the said Coach and accepted delivery of the same. In fact, at p. 41 of the notes of proceedings, in DW1's answer to PUT 18, PUT 19, PUT 21 and PUT 22, DW1 confirmed that the said Coach was accepted by the 1st defendant in good condition. E

[19] Since the said Coach was burnt after the ownership and risk of the same was transferred to the 1st defendant and whilst in the 1st defendant's possession, control and care, the 1st defendant is wholly responsible for the loss of the said Coach. In support, I refer to the decision of Datuk David Wong Dak Wah, JC (as he then was) in the case of *Ling Chick Ngai v. Scott & English (M) Sdn Bhd*, [2006] 7 CLJ 602 which concerns the passing of risk of a generator set delivered to the buyer, who subsequently shipped to a third party and His Lordship stated that: F G

> It was a straight forward case ie, of a buyer accepting delivery of a good he contracted to buy in performance of a contract he had with a third party (ie, Mulu National Park). He arranged for the shipment of the generator set to the third party and allowed the third party possession of the generator set. H
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> In the words of Lord Norman which I have emphasized above and would repeat here, *the defendant has 'immediate and practical interest' in the generator set such that he even was willing to accept the generator set* without the accessories being delivered, something which he could have reasonably used as an excuse for not wanting to accept its delivery. **I would thus conclude that the risk in this case has indeed passed to the defendant**. I
> (emphasis added)

[20] I find that the 1st defendant has failed to adduce any credible evidence to prove that the engine of the said Coach was defective or that the fire was caused due to the defects in the building of the said Coach.

[21] From the report of Jabatan Bomba on the fire at p. 2 of PAANCBD (exh. D1), at para. 4.1, it stated that the fire is believed to be caused by the engine. When asked on the source of such belief, PW3 testified that it was based on the statement given by the driver of the 1st defendant (refer to the answers to Q8 and Q9 and Q10 at p. 59 of the notes of proceedings). PW3 also testified that there is a corrective report (exh. P9(a) and (b)) prepared by Jabatan Bomba which stated that the cause of fire is unknown.

[22] PW3 inspected the said Coach again on 19 April 2012 and after inspection, he stated that he cannot be certain as to the cause of fire but he is of the opinion that it was very likely that the fire had started from the front of the said Coach as it appeared to him, from the physical inspection of the remaining parts of the said Coach that the whole of the front portion of the said Coach was burnt and some parts at the back of the said Coach were not burnt, such as the tyres and the body (refer to PW3's answer to Q9, p. 63 of the notes of proceedings). PW3 further testified that he did not agree that the fire started from the engine of the said Coach as the engine is located at the back of the said Coach. PW3 in his answers to Q6 and Q7 at p. 66 of the notes of proceedings, also testified that the condition of the engine appeared to be ok and the engine did not explode at the time of the fire.

[23] Further, it is in evidence that the said Coach has passed the requisite PUSPAKOM test for roadworthiness prior to the registration of the 1st defendant's name as the owner of the said Coach, (refer to p. 8(A) PAABD (exh. P2(a)), which is the Penetapan Pemeriksaan Kenderaan, p. 8 PAABD (exh. P2(b)), Laporan Pemeriksaan Awalan/Khas, p. 9 PAABD (exh. P2(c)) which is the Laporan Pemeriksaan Kenderaan Perkhidmatan Awam (Pemeriksaan Awalan Bus), p. 10 PAABD (exh. P2(d)) being the Laporan Pemeriksaan Berkala for the said Coach, p. 11 PAABD (exh. P2(e)), the plan of the said Coach approved by Jabatan Pengangkutan Jalan, PUSPAKOM, p. 12 PAABD (exh. P2(f))

which is the Vehicle Roadworthiness Test Report by PUSPAKOM, p. 13 PAABD (exh. P2(g)), the Perakuan Pemeriksaan, as well as p. 14 PAABD (exh. P2(h)) - License for Bas Persiaran issued by Kementerian Perlancongan Malaysia.

Consideration Of The 1st Defendant's Countercliam

[24] I find that the 1st defendant has failed to adduce any credible evidence to prove its counterclaim.

Consideration Of The Plaintiff's Case Against The 2nd Defendant

[25] The plaintiff contended by virtue of pp. 65 and 66 of DBD2 (exh. D14(a) and (b)), which is a copy of the plaintiff's letter to the 2nd defendant dated 21 June 2007, wherein the plaintiff acknowledged receipt of the 2nd defendant's letter of undertaking dated 11 April 2007 and the plaintiff stated that in reliance thereof, the plaintiff ordered the chassis for the said Coach from the chassis supplier and further by virtue of the plaintiff having issued an invoice in the name of the 2nd defendant whereby the 2nd defendant signed at the bottom of the said invoice (refer to p. 5 of PAANCBD (exh. P3(a)), the plaintiff relied on the 2nd defendant's representation for payment of the balance of purchase price before delivery of the said Coach to the 1st defendant.

[26] As regards the plaintiff's contention that DW1 agreed and instructed the plaintiff to release the said Coach to the 1st defendant and she, on behalf of the 2nd defendant, undertook to release the payment to us in two weeks time, from the 29 May 2007 and that this is collaborated by the fact that DW1 inspected the said Coach prior to the delivery of the said Coach to the 1st defendant. However having heard the testimony of the DW1, I prefer DW1's version of events over that of the plaintiff in that DW1 did not instruct or undertook in the manner as contended by the plaintiff.

[27] The plaintiff in his submission had stated that it is one of the pre-disbursement conditions of the said loan that the said Coach had to be delivered to the 1st defendant. Thus the 1st defendant knew that the 1st defendant had, in any event to deliver the said Coach to satisfy one of the pre-disbursement conditions and I find that the issue of DW1 having agreed to release the said loan to the plaintiff, within two weeks from the date of delivery of the said Coach, would not arise.

[28] I find that the 2nd defendant is not liable to pay out the said loan to the plaintiff for the following reasons:

(a) The 2nd defendant's letter of offer dated 5 October 2006 (exh. D3(a)-(r)), letter dated 10 January 2007 (exh. D11), the supplementary letter of offer dated 26 February 2007 (exh. D12(a)–(c)), the 2nd supplementary letter of offer dated 14 June 2007 (exh. D8), contained the pre-disbursement conditions that must be fulfilled by the 1st defendant before payment can be released by the 2nd defendant to the plaintiff. Since the 1st defendant failed to fulfil the requirement of item 5 of Annexure A (exh. D3(a)-(r) at p. 13 of DBD2) when it failed to pay the initial payment of RM45,166.02 to the 2nd defendant, ie, the advance rental payment of RM37,638.35 and the first month rental payment of RM7,527.67. The 2nd defendant has no contractual obligation to release the payment to the plaintiff. I noted that it is the practice of the 2nd defendant that they will not make any disbursement of loan if their customer fails to fulfil all of the pre-disbursement conditions imposed.

(b) I find that it is clear that the 1st defendant knew very well that it's failure in paying the sum of RM45,166.02, being the deposit for the lease and the first month rental/hire charges for the said Coach, will result in the 2nd defendant's refusal to disburse the said loan.

(c) The 2nd defendant is not privy to the agreement dated 29 May 2007 entered between the plaintiff and the 1st defendant for the purchase of the said Coach and the plaintiff is not privy to the letter of offer dated 5 October 2006 and the lease agreement dated 19 December 2006 entered into between the 1st defendant and the 2nd defendant.

[29] Furthermore, the plaintiff knew at all material times that the pre-disbursement conditions have not yet been fulfilled by the 1st defendant and the plaintiff knew that the 2nd defendant has no contractual obligation to release the payment for the said Coach to the plaintiff. PW1, Lee Seng Chew, manager of the plaintiff's company, said he was aware that the 1st defendant must fulfill the pre-disbursement conditions before the 2nd defendant can release the payment to the plaintiff (refer Q5, Q8 and PUT14 at pp. 13, 14 and 16 of NOP).

[30] I find that even though the inspection of the said Coach was conducted by DW1 at the plaintiff's office on 1 June 2007 at 10.50am until 11.20am. DW1 stated that she has only inspected the physical condition of the said Coach including the chassis and engine number without inspecting the conditions of the engine and test driving the said Coach (refer Q13 of DW1 - WS and Q2 at p. 38 of NOP and Q2 and Q3 at p. 50 of NOP).

[31] PW1 testified that the delivery of the said Coach from the plaintiff to the 1st defendant was made on 1 June 2007 at around 7.20pm (refer Q27 at p. 20 of NOP) and that the delivery of the said Coach to the 1st defendant was witnessed by the supervisor and the driver of the 1st defendant's company together with DW1 (refer Q28 at p. 20 of NOP). Having heard the testimony of DW1, I find that the delivery of the said Coach was made by the plaintiff to the 1st defendant without the instruction, knowledge and consent of the 2nd defendant as contended by the plaintiff.

[32] I find that the 1st defendant was in breach of another pre-disbursement conditions in that the 1st defendant was required to purchase an insurance policy from PLC Credit & Factoring Sdn Bhd or any insurance company approved by the 2nd defendant as stipulated in cl. 16(c) of the letter of offer (exh. D3(a)-(r) at p. 4 of DBD2). Instead, the 1st defendant purchased an insurance policy through the plaintiff from Kurnia Insurans (Malaysia) Berhad (exh. D4 at p. 78 of DBD2), which is not approved by the 2nd defendant.

Order

[33] In the premises, I find that the plaintiff has proved its case on a balance of probability against the 1st defendant and I therefore order judgment to be entered against the 1st defendant in terms of the statement of claim and that the 1st defendant's counterclaim is dismissed.

[34] As regards the case against 2nd defendant, I find that the plaintiff has failed to prove its case against the 2nd defendant. In the premises I dismiss the plaintiff's case against the 2nd defendant with costs.